United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1424
76-1425

To be argued by
THOMAS M. FORTUIN

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 76-1424, 76-1425

UNITED STATES OF AMERICA,

Appellee,

—v.—

LUGENIA BARNES,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES THOMAS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
AUDREY STRAUSS,
Assistant United States Attorneys, Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lugenia Barnes and Charles Thomas appeal from judgments of conviction entered on September 15, 1976, in the United States District Court for the Southern District of New York after a five-day trial before the Honorable Charles E. Stewart, United States District Court Judge, and a jury.

Indictments 75 Cr. 887 and 888 were filed on September 5, 1975. Indictment 75 Cr. 887 charged Lugenia

Barnes with three counts of perjury before a grand jury sitting in the Southern District of New York on August 21, 1975 in violation of Title 18, United States Code, Section 1623. Indictment 75 Cr. 888 charged Charles Thomas with two counts of perjury before the same grand jury on August 29, 1975.

On the motion of the defendants, the indictments were consolidated for trial. Trial began on June 29, 1976. On July 2, 1976, the jury found Lugenia Barnes guilty on Counts One and Two and acquitted her on Count Three of the indictment. The jury found Charles Thomas guilty on both counts of the indictment charging him.

On September 15, 1976, Barnes was sentenced to four months imprisonment on each of Counts One and Two, the sentences on each count to run concurrently. On the same day, Thomas was sentenced to fifteen months on each of Counts One and Two to run concurrently with each other, but consecutively to the sentence of six to twelve years which he received upon his plea of guilty in New York County Supreme Court to manslaughter in the first degree.*

Thomas is incarcerated on New York State charges pending appeal and Barnes is at liberty pending appeal.

By order of this Court, the cases were consolidated on appeal.

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* Thomas's plea was in satisfaction of homicide charges brought against Thomas for shooting and killing Charles McLaughlin in a bar-room fight on March 3, 1965.

Thomas was twice granted parole on this sentence, but each time his parole was revoked. It was after he was released on parole for the second time that he committed the instant offense.

Statement of Facts

The Government's Case

A. The Discovery of the Bodies

On Sunday morning, August 10, 1975, a passerby noticed an obnoxious odor emanating from a U-Haul van that was parked on the east side of Claremont Avenue, just south of the corner of West 122nd Street in New York City, near Riverside Church, and asked the police to investigate. (Tr. 122, 155).* At approximately 10:00 A.M. the van was opened by police and the bodies of two dead men were found inside. (Tr. 123). One was Oscar Wilson, a/k/a "Chink," and the other Oswald Peterson, a/k/a "Atlantic City Pete." (Tr. 123). Both men had been shot to death, and their bodies had been wrapped in plastic and bed covers. (Tr. 123-24).

Upon discovering the van, Detectives Robert Behan and Joseph Gunn and other officers of the Fifth District Homicide Zone began an investigation of the dual homicide. Later, they were assisted by members of the Manhattan Homicide Task Force. After removing the bodies, the detectives had the van dusted for fingerprints, and they inspected for clues. A cardboard rental agreement for the van was found inside the van above the visor on the driver's side. (Tr. 127; GX 1). The rental agreement bore the name and address of the lessor: Lugenia Barnes, 340 East 181th Street, Bronx, New York. The rental agreement showed that the van had been rented on the previous Friday, August 8, 1975 at 1:00 P.M. from a

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* References to "Tr." are to pages of the trial transcript. References to "GX" and "DX" are to trial exhibits of the Government and defense, respectively. References to "App." are to Appellants' Appendix.

Gulf service station located in the Bronx on Gun Hill Road near Webster Avenue. The agreement also set forth the mileage recorded on the van's odometer at the time of the rental. The homicide detectives recorded the mileage on the van's odometer when it was discovered. (Tr. 126).

B. The Defendants' Perjurious Grand Jury Testimony

Shortly after the bodies were found, a grand jury sitting in the Southern District of New York began an investigation of the murders.* Lugenia Barnes was subpoenaed before the grand jury and testified on August 21, 1975. (GX 4; App. 14-30).

At the beginning of the proceeding, Barnes was sworn in and given warnings as follows:

> Q. Miss Barnes, my name is Tom Fortuin, I'm an Assistant United States Attorney. This is a United States Grand Jury. Let me tell you what the Grand Jury is investigating and explain your rights to you. The Grand Jury is investigating various violations of the federal law, and all of these really grow out of the death a couple of weeks ago of a Mr. Peterson and a Mr. Wilson, an event I think you're familiar with.

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* Wilson had been a registered informant with the Drug Enforcement Administration until April 1975 at which time he received a sentence of probation from Judge Metzner as a consequence of his cooperation with the Federal Government. Shortly before his death, Peterson, who had previously been convicted on federal narcotics charges, had been indicted in the Southern District of New York on May 29, 1975 along with nineteen others on narcotics charges in the case of *United States of America* v. *Ralph Tutino*, a/k/a *"The General," et al.*, Indictment 75 Cr. 510. Peterson had been released on bail awaiting trial when he was murdered.

A. Right.

Q. The statutes we're concerned with involve violation of the civil rights laws, a conspiracy to deprive somebody of his civil rights, Section 241, Title 18, United States Code; and we're investigating obstruction of criminal investigation which would be Section 1510 of Title 18, United States Code; we're investigating influencing a witness, which would be Section 1503 of Title 18, United States Code; and we're investigating violations of the narcotics laws. These statutes may not be particularly meaningful, and I think I've told you the event we're going to focus on. Now, in connection with that, I advise you that you have a constitutional right to refuse to answer any question that I may ask you on the ground that a truthful answer to that question might tend to incriminate you. Do you understand that?

A. I believe so.

Q. Now, you have a right to have an attorney and you have a right to consult with him prior to answering any questions here. Do you understand that?

A. I do.

Q. And if you do not have funds to retain an attorney, an attorney will be appointed to represent you by the Court, and you're allowed to have that attorney outside the Grand Jury room where you could consult with him. Do you understand that?

A. Yes, I do.

Q. He couldn't come in here, but he could be outside and you could consult with him in that manner. Do you understand?

A. Right. Excuse me—I was only notified this afternoon at twelve o'clock that I was to appear here, so I didn't have an opportunity to speak to my attorney or anything, and I really don't know whether or not I should answer any questions. I called him until the time that I came in, to be advised, but he is not there.

Q. And who is your attorney?

A. Melvin Katske.

Q. How do you spell that?

A. M E L V I N K A T S K E.

Q. Would you like an opportunity—would you like to have an adjournment, during which time you can talk to your lawyer?

A. No, but I think that at—if I feel, during the questioning that——

Q. If——

A. ——I need an attorney, I would like to have one. Do I have that right?

Q. If at any time you'd like to consult with him or call him on the phone or seek an adjournment, you can do that. You can interrupt us and you can do that. Do you understand that?

A. Yes, yes. (App. 14-15).

Shortly after the beginning of Barnes' testimony she was also advised that she was testifying under oath and that it would be a federal crime to "purposely and knowingly" give false testimony. (App. 17-18).

Barnes then testified that on Friday, August 8, 1975, at 1:00 P.M. she and her boyfriend Charles Thomas

rented the U-Haul van in order to move some clothing and a chair belonging to Thomas from his apartment in Manhattan, 11 West 118th Street, to her apartment, 340 East 184th Street, in the Bronx. After renting the van she drove it around in the Bronx for a while to become accustomed to its steering. This ride took about forty-five minutes to an hour. She and Thomas then drove to Thomas' apartment in Manhattan in order to see if the van would accommodate all of his belongings. The defendants then drove to the home of Thomas' mother, about a block away, and from there to a MacDonald's restaurant located on 125th Street. The defendants then drove to Barnes' apartment in the Bronx. Barnes and Thomas next went in the van to Barnes' doctor's office, a short distance away on Grand Concourse Avenue, and, thereafter, back to Thomas' Manhattan apartment. When they arrived there they loaded the van with Thomas' belongings and then drove back to 340 East 184th Street in the Bronx where they unloaded the van. (App. 16-21).

At about 7:30 P.M. they parked the van in an illegal parking spot on the street outside of Miss Barnes' apartment. At 12:30 A.M. Saturday morning Thomas and Barnes returned to the van in order to repark it legally. Thomas reparked the van and gave the keys to the van back to Barnes, who placed them in her pocketbook. On August 9, 1975, Barnes and Thomas left Barnes' apartment at 7:30 A.M. in order to return the van to the U-Haul rental station. Barnes and Thomas discovered that the van had been stolen and called the police to report the missing vehicle. (App. 21-26).

On August 29, 1975, Charles Thomas testified before the same grand jury. (GX 5; App. 31-31). Thomas' testimony was consistent with Barnes' in all but one respect. Thomas testified that, after moving the furniture,

he and Barnes parked the van on Valentine Avenue between 183rd and 184th Streets at approximately 7:00 P.M. and then returned to Miss Barnes' nearby apartment where they fell asleep. At 1:00 A.M. Saturday morning, according to Thomas, he went outside to repark the van and discovered that it was missing. Thomas testified that the van was reported stolen at that time. Thomas' statements before the grand jury were the same as those he made to the police during an interview on August 11, 1975. Thomas was asked if his statements to the police were true. He testified that they were. (App. 36). He was also asked if he wished to modify or correct these statements. Thomas said he did not. (App. 36).

C. The Evidence Demonstrating the Falsity of the Defendants' Grand Jury Testimony

The Government's evidence established, first, that Barnes and Thomas could not have travelled in the van over the route they described. The route described by Thomas and Barnes covered over thirty-four miles. According to the odometer readings taken at the time of rental and at the time of discovery of the van, the van had travelled but fourteen miles from the place where it was rented to the place where it was discovered with the bodies in it. Second, the evidence established that the van had not been stolen. Third, the Government's evidence established that the van was parked on Claremont Avenue near West 122nd Street at approximately 3:30 P.M. on Friday, October 8, 1975, only two and a half hours after it had been rented by the two defendants and many hours before the times at which Barnes and Thomas claimed they last had the van in their possession.

1. The mileage travelled in the van did not comport with the defendants' story

By subtracting the starting mileage listed on the rental agreement at the time of the rental of the van

from the mileage shown on the van's odometer when it was discovered on Claremont Avenue, the homicide detectives established that the van had travelled only fourteen miles from the garage where it was rented to the location on Claremont Avenue where it was found with the bodies in it. On August 20, 1975, Detective Behan drove the U-Haul van and traced the route which Barnes and Thomas testified they travelled. The mileage of this traced route from the garage to Barnes' apartment following the route described by the defendants was in excess of thirty-four miles. (Tr. 148).

This figure was conservative in that it did not take into account the forty-five minutes to an hour that the defendants said Barnes had driven the van about in order to become familiar with its manual steering mechanism. It also did not include distance covered looking for parking spaces. Furthermore, the distance from Barnes' apartment to Claremont Avenue and 122nd Street where the van was found was 5.9 miles by the most direct route. If the van had been stolen and then driven to 122d Street and Claremont Avenue, as Barnes and Thomas claimed, it would have had to cover this distance as well. (Tr. 319).

The defendants stipulated that the van's odometer was accurate.* (Tr. 312-13, 316). Other evidence established that the odometer had not been tampered with and that the starting mileage contained in the rental contract was accurate. After removing the bodies from the van, Detectives Behan and Gunn each examined the cable to the odometer, located under the dash, and found that it was connected and that the dust surrounding it was undisturbed, establishing that it had not been tampered with. (Tr. 131, 266).

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* In fact, the van's odometer was found to indicate three percent "over-registration." The practical effect of this over-registration would be that for every 100 miles shown on the odometer, only 97 miles would have actually been travelled. (Tr. 316).

Martin Jaffe, an owner of the Gulf Service Station in the Bronx from which the van had been rented, testified that accurate mileage records are maintained in the ordinary course of business of the station because customers must pay for all mileage travelled over the first sixty miles. (Tr. 208-09, 220, 237-39). Jaffe also identified the rental contract for the previous renter of this particular van, Brendan Fogarty. (Tr. 215, 218-19; GX 8). Fogarty, a part-time college student who had rented the van with friends, distinctly recalled from calculations he had made when he returned the van that he had travelled 205 miles in the van. (Tr. 252-53). This is precisely the difference in the number of miles between his own starting mileage and that recorded on Barnes' contract, confirming that the mileage set forth on the Barnes' contract was indeed accurate.

2. The van had not been stolen

After discovering the van, Detectives Behan and Gunn each examined the van's ignition system to see if the ignition wires had been "jumped" or "hot-wired." (Tr. 128, 264).* The detectives testified as expert witnesses that no jump-start had occurred on this particular van. (Tr. 130, 266, 269).

When examining the van, each of the detectives checked under the vehicle's dashboard to see if any telltale signs of a jump-start were evident. (Tr. 128, 266). The wires leading to the battery and to the electric starter had not been crossed, nor did there appear to be any burn marks on these wires. (Tr. 130-31). The detectives stated that based upon their experiences a jump-start would leave such identifying marks. (Tr. 130, 131, 269). In addition,

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* Both men had had extensive prior experience with jumped cars and trucks. (Tr. 128, 130, 264-66).

the van was dirty. (Tr. 131). There was a residue of dirt, dust, and grime covering the wires under the dash and the ignition switch, which the engine had thrown up. The residue covered the wires in a uniform and undisturbed manner establishing that they had not been tampered with. (Tr. 266). Although at the trial there was testimony about other methods and avenues by which to jump-start this particular year and make of van, they were quickly dismissed by the detectives.*

Moreover, although Barnes testified she had kept the keys to the van, when asked to produce them by the homicide detectives, she claimed that they had been lost. (App. 23, 25).

3. The van was parked with the bodies in it long before the time the defendants claim they last had the van in their possession

Lugenia Barnes testified that she and Thomas last saw the U-Haul van in the early morning hours of Saturday, August 9, 1975, at 12:30 A.M., when she and Thomas parked the van for the night on Valentine Avenue between 183rd and 184th Streets in the Bronx. (App. 22). Thomas testified he had last seen the van at approximately seven o'clock Friday evening. (App. 36).

Glen Lehman, a student at the Westminister Choir College, Princeton, New Jersey, was staying with his brother on Friday, August 8, 1975. Lehman's brother occupied a room on the second floor of McGifford Hall, the dormitory of Union Theological Seminary, directly across from where the van was parked. While waiting

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* Detective Gunn discounted the possibility of the van being jumped from under the hood. (Tr. 267-68). The hood to this van is located inside the cabin, between the driver's and passenger's seats. (Tr. 266). Like the wires under the dashboard, the hood was covered with residue that showed no signs of having been disturbed. (Tr. 266).

for his brother to return from work, Lehman stood before the window in his brother's room and looked out onto Claremont Avenue. From that position, at a time he estimated to be 3:30 P.M., but certainly before 4:00 P.M., he saw the U-Haul van being parked. Three black men got out of the car, walked to the back of the van, opened the rear doors a few inches and looked inside. They then secured the rear doors, split up into two groups and walked away. (Tr. 324-26). Two days later, when the bodies in the van were discovered by police, Lehman recognized it as being the very same van he had seen the previous Friday. (Tr. 327-28).

The Reverend William N. Kight, then youth minister for the Riverside Church, left the church with some boys after a youth group meeting on Friday, August 8, 1975, at approximately 10:30 P.M. That evening, as on other occasions, the Reverend Mr. Kight played a game that he and the youths had devised. The boys would point to a vehicle on the street and the Reverend Mr. Kight, whose father had been a test car driver, would attempt to identify the model and year of the vehicle singled out. (Tr. 71). This game was played with respect to the U-Haul van. Kight recalled that the van was a 1968 or 1969 model (in fact, the van in which the bodies were discovered was a 1969) and that the van had Maine license plates (as, indeed, the van containing the bodies had). (Tr. 71-72, 131). The Reverend Mr. Kight saw the same van again in the same parking place on both Saturday and Sunday mornings before the bodies were discovered. (Tr. 75).

Finally, Robert Walker, who was a student at the time at Union Theological Seminary and who also lived in McGifford Hall, saw the van on Friday night at approximately 10:30 P.M. (Tr. 291-96). He was walking along

the street with a girlfriend when he noticed the van. On Sunday morning, he saw the van again, as the bodies were being removed, in the same position he had seen it on Friday night. (Tr. 291).

The Defense Case

Neither defendant testified in his or her own behalf.

Thomas called only one witness, William T. Higgins, the Chief of Police in Highland Falls, New York. Higgins, recently retired from the Special Investigation Division of the New York City Police Department's Auto Squad, testified on direct examination that it is possible to jump-start a car without leaving any telltale marks. (Tr. 366).

On cross-examination, however, Chief Higgins testified that in "most cases" where a vehicle is jumped there would be clear and obvious evidence to that effect left in the vehicle. (Tr. 367). Police Chief Higgins further admitted that he was unfamiliar with the particular model and year of van in question and that he was, therefore, unqualified to testify about how one would go about jump-starting it so as to leave no mark. (Tr. 370-71). He testified, consistent with the Government's proof, that, if there were dust or dirt under the dashboard, that would have to be disturbed to "jump start" or "hot wire" the van. (Tr. 369-70).

ARGUMENT

POINT I

Barnes Was Not Entitled to a Target Warning in the Grand Jury.

Barnes claims that the indictment against her should be dismissed because she was not told in the grand jury that she was a "target" of the grand jury's investigation. This point is meritless: First, Barnes was not a target of the grand jury investigation. Second, the rule set forth in *United States* v. *Jacobs*, 531 F.2d 87 (2d Cir. 1976), *remanded*, 44 U.S.L.W. 3327 (U.S., Nov. 1, 1976), requiring target warnings, has not survived the Supreme Court's opinion in *United States* v. *Mandujano*, 44 U.S.L.W. 4629 (May 19, 1976).

A. Barnes Was Not A Target of the Grand Jury Investigation

Barnes was called before a grand jury sitting in the Southern District of New York on August 21, 1975. As she was explicitly informed, the grand jury was investigating possible violations of criminal laws including conspiracy to deprive persons of their civil rights, 18 U.S.C. § 241, and obstruction of justice, 18 U.S.C. § 1503. She was specifically told that the investigation related to "the death a couple of weeks ago of a Mr. Peterson and a Mr. Wilson." (App. 14).*

Barnes suggests that in calling her to appear before the grand jury "the government was not attempting to

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* Barnes was also given extensive warnings, as set forth in full in the Statement of Facts, *supra* at 4-6.

gather information, but rather was attempting to snare Barnes into a perjury indictment." (Br. at 6). The Government finds this to be an astounding allegation. The grand jury was investigating the deaths of Wilson, a registered informant for the Drug Enforcement Administration, and Peterson, a defendant who had recently been indicted in a large narcotics case in the Southern District of New York. Where Barnes was the last person known to have possession of the U-haul van in which the corpses of these persons were found, the Government obviously called her into the grand jury hoping to gather truthful information about the murders and to determine whether they were committted to prevent Wilson or Peterson from testifying for the Government or supplying the Government with information about large-scale narcotics trafficking. The Government was plainly not plotting to obtain a perjury indictment against Barnes.

Having properly called Barnes before the grand jury to obtain her testimony about the use of the van on the day of the murders, the Government questioned Barnes in an entirely proper way.* Barnes, relying on this Court's opinion in *United States* v. *Jacobs*, 531 F.2d 87 (2d Cir. 1976), however, argues that the indictment should be dismissed solely because the prosecutor did not say that Barnes was a target of the grand jury's investigation. The complete answer to Barnes' argument is that the prosecutor did not advise her that she was a target of

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* Judge Stewart reviewed the transcript of the entire grand jury testimony of both Barnes and Thomas and concluded that, "I see no reason why there should be any doubt about the propriety of the functioning of the grand jury," and "The way in which the grand jury was conducted does not raise any question in my mind." (Tr. 64). He further commented,

> "it seems to me I am fully satisfied that Mr. Fortuin [the prosecutor]—I am not going to comment on his behavior; I don't think he can be subject to criticism of any substantial nature . . ." (Tr. 20).

the investigation because she was not. The Government had no basis upon which it could responsibly tell Barnes that she was a subject of the investigation or a "putative" defendant. Indeed, she was never charged with violations of the laws which the grand jury was investigating.*

Even those who would require that a witness he given target warnings before the grand jury limit the requirement to situations either (1) where the prosecutor has probable cause to suspect that the witness has committed a crime, *United States* v. *Mandujano, supra,* 44 U.S.L.W. at 4640 (concurring opinion of Mr. Justice Brennan) or (2) where the prosecutor intended to indict the witness, *United States* v. *Scully,* 225 F.2d 113, 117 (2d Cir.),

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* In all but one of the cases noted by this Court in *United States* v. *Jacobs, supra,* 531 F.2d at 90 n.5, where target warnings were given, the Government was able to gather sufficient evidence to indict the defendant not merely for perjury, but also for a substantive federal offense. See *United States* v. *Del Toro,* 513 F.2d 656 (2d Cir.), *cert .denied,* 423 U.S. 8826 (1975); *United States* v. *Corallo,* 413 F.2d 1306, 1328, 1329 n.6 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969); *United States* v. *Irwin,* 354 F.2d 192, 199 (2d Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *United States* v. *Winter,* 348 F.2d 204 (2d Cir.), *cert. denied,* 382 U.S. 955 (1965). But see *United States* v. *Bonacorsa,* 528 F.2d 1218 (2d Cir. 1976). The target warning to the putative defendant was probably based on at least some of that evidence. Absent evidence that a witness may be guilty of the crimes being investigated, a target warning is simply not appropriate.

The fact that the indictment described the scope of the investigation as including "the role, if any," of Barnes and Thomas in disposing of the bodies of Peterson and Wilson does not elevate Burnes to the position of a "target" or putative defendant. The grand jury may properly investigate the criminal involvement of all witnesses with knowledge of relevant events. However, if there is no incriminating evidence in the hands of the Government at the time the witness testifies, that person cannot properly be called a target or putative defendant.

cert. denied, 350 U.S. 897 (1955) (concurring opinion of Frank, J.). Neither standard was even remotely met here. Moreover, even those advocating such a position would not dismiss a perjury indictment even where the defendant had not been advised of his rights. *United States* v. *Mandujano*, *supra*, 44 U.S.L.W. at 4636.

Defense counsel does not suggest that the Government had in its possession information implicating Barnes in the murders then being investigated. Instead, counsel appears to be contend primarily that she was entitled to a target warnings in connection with the perjury which she had not yet committed. In other words, the prosecutor should have warned her that she was then the target of a perjury investigation even though she had not yet testified under oath. This position makes no sense.

First, the Government cannot predict that a witness will commit perjury and thereby become the subject of a perjury investigation. Here, Barnes argues that the Government "knew or believed" that she had given a false statement to police officers about the facts at issue and that it therefore should have expected her to commit perjury. This assertion is without basis in fact. The evidence essential to establishing the falsity of Barnes' testimony was not in the Government's possession at the time of her grand jury appearance.* Even if the Govern-

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* Prior to Barnes' appearance before the grand jury, the Government did have evidence that the route that Barnes told the police she had taken in the van was longer than the mileage the van had travelled according to the rental agreement for the van and did have Lehman's statement that he saw the van parked at 122d Street and Claremont Avenue at approximately 3:30 Friday afternoon. This evidence, however, was not sufficient to establish the falsity of the story Barnes told the police because there could be no assurance, first, that the mileage set forth on the rental agreement for the van was accurate or, second, that the

[Footnote continued on following page]

ment has the belief or suspicion that a witness has given false information to the police, the Government has the right to expect that upon taking the oath before a federal grand jury, the witness will give truthful testimony.

Here, the defendant was warned that perjury before the grand jury would be a federal crime, a warning which both the United States Supreme Court and this Court have found to be redundant of the oath. *United States* v. *Mandujano*, *supra* at 4635; *United States* v. *Del Toro*, *supra*, 513 F.2d at 664; *United States* v. *Winter*, *supra*, 348 F.2d at 210. That warning, which

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van Lehman saw was the same van that was discovered with the bodies in it the following Sunday.

The Reverend Mr. William Kight was not interviewed by homicide detectives until August 22, 1975, the day following Barnes' testimony. (Tr. 90-92). The Reverend Mr. Kight's testimony was essential because of his unusual reliability and credibility and because he recognized the year and license plates on the van and was thus the only person who could firmly establish that the van discovered Sunday morning was the same van as the one seen on Claremont Avenue the previous Friday. At the time of Barnes' testimony, the homicide detectives had not yet verified the accuracy of the starting mileage contained on the rental agreement for the van (GX 1), which could simply have been in error. It was not until August 26, 1975, that the detectives visited the Gulf Service Station at Gun Hill Road and Webster Avenue in the Bronx and confirmed the accuracy of the starting mileage. (Tr. 226). At that time, Martin Jaffe, one of the owners of the garage, gave the detectives the rental agreement for the van which preceded the rental by Barnes. The detectives then contacted Brendan Fogarty, who had rented the van before Barnes. Fogarty recalled that he had travelled 205 miles in the van, precisely the difference between the starting mileage on his contract and the starting mileage on Barnes' contract. Fogarty's rental agreement coupled with his recollection that he had gone 205 miles in the van was essential to establish the accuracy of the starting mileage set forth on Barnes' rental agreement.

was gratuitous and exceeded any legal requirement, was clearly more appropriate than a "target" warning for a prospective crime which the "target" had not yet committed.

This case is a far cry from *United States* v. *Jacobs*, *supra*. In *Jacobs*, the Government conceded that the defendant was a "putative defendant" at the time of her grand jury appearance. Indeed, the Government had independent evidence, based on tape recordings, establishing the defendant's guilt of a substantive federal offense and the District Court found that her grand jury appearance had "*no other function*" then to add a perjury count to the indictment. 531 F.2d at 89. The requirement of a target warning in *Jacobs* was predicated not on the prospect that the defendant might commit perjury before the grand jury, but on the fact that the grand jury investigation had already established that Mrs. Jacobs was subject to indictment on the underlying substantive offense. Here the Government had no evidence incriminating Barnes in any crime over which the grand jury had jurisdiction and could not possess evidence of her perjury because she hod not yet chosen to commit that crime. The Government obviously was not required to tell Barnes in these circumstances that she was a target of the investigation because, in fact, she was not, and the Government had no basis for giving any such warning.

B. The Rule Set Forth in *United States* v. *Jacobs*, 531 F.2d 87 (2d Cir. 1976), Has Not Survived the Supreme Court's Opinion in *United States* v. *Mandujano*, 44 U.S.L.W. 4629 (U.S., May 19, 1976).

Although the Government contends that *United States* v. *Jacobs*, *supra*, has no applicability to this case because a target warning was not appropriate here, in light of *United States* v. *Mandujano*, *supra*, the rule established in *Jacobs* has lost its validity in any event. In *United States* v. *Mandujano*, *supra*, the Supreme Court reversed the Court of Appeals for the Fifth Circuit, whose opinion had been relied upon by the District Court in dismissing the indictment in *United States* v. *Jacobs*, *supra*. All eight members of the Supreme Court who took part in the decision agreed that in a prosecution for perjury committed before a grand jury, the absence of *Miranda*-type warnings to the grand jury witness, even though the witness was a "putative defendant," did not warrant suppression of the perjurious grand jury testimony. Indeed, the plurality opinion in *Mandujano* characterized the practice of giving constitutional warnings to a Grand Jury witness as "an extravagant expansion never remotely contemplated by this Court in *Miranda*." 44 U.S.L.W. at 4634.

On November 1, 1976, the Supreme Court in a *per curiam* opinion granted a writ of *certiorari* and remanded the case of *United States* v. *Jacobs* to this Court "for further consideration in light of *United States* v. *Mandujano*. . . ." 45 U.S.L.W. at 3327. It is clear from this remand that five Justices of the Supreme Court felt that the *Jacobs* case is controlled by the subsequent Supreme

Court opinion in *Mandujano*. Mr. Justice Stevens, who did not participate in the decision of the *Jacobs* case, concurred in the order remanding the case on the ground that, "There is an omission in the Court of Appeals' opinion which makes it appropriate for that Court to re-examine its holding." Mr. Justice Stevens felt that the fact that a prosecutor may "have erred in failing to give a grand jury witness adequate warnings . . . does not lead inexorably to the conclusion that the witness cannot be prosecuted for perjury." 45 U.S.L.W. at 3327.*

In view of the Supreme Court's opinion remanding *Jacobs* to this Court, it is clear that *Jacobs* has no vitality in light of *Mandujano*, as Judge Stewart found below. (Tr. 20-21).**

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* The remaining three Justices felt that this Court's opinion in *Jacobs* was unaffected by *Mandujano* because *Jacobs* was based solely on the supervisory power. The Solicitor General took the position in the Supreme Court that the admissibility of a defendant's statements is governed by 18 U.S.C. § 3501 and that there is no supervisory power which permits what would amount to an amendment of those statutory provisions.

** Even if this Court finds that Barnes was a target of the grand jury investigation, a matter strenuously contested by the Government, and even if this Court finds that *Jacobs* survives *Mandujano*, the rule announced by this Court in *Jacobs* should be granted prospective application only. There is clear authority for applying *Jacobs* prospectively only, *United States* v. *Catino*, 403 F.2d 491, 497 (2d Cir. 1968), *cert. denied*, 394 U.S. 1003 (1969); *United States* v. *Guthrie*, Dkt. No. 76 Cr. 21, slip op. at 5 (S.D.N.Y., May 12, 1976) (Pierce, J.); *cf. Korenfeld* v. *United States*, 451 F.2d 770 (2d Cir. 1971), and such a holding would make sense, particularly in light of the authority in the Southern District of New York prior to the decision in *Jacobs* that target warnings were unnecessary. *United States* v. *Potash*, 332 F. Supp. 730, 733 (S.D.N.Y. 1972) (Weinfeld, *J.*).

POINT II

The Evidence Relating to The Discovery of the Bodies Was Plainly Admissible.

Barnes and Thomas complain of the admission into evidence of testimony concerning the two dead bodies which were found in the van and which were the subjct of the grand jury's inquiry. This evidence was plainly admissible (1) because it established the defendants' intent to commit perjury; (2) because the credibility of the Government's key witnesses was intimately connected with the discovery of the bodies; and (3) because this evidence established a motive and plan or scheme on the part of the defendants to conceal matters from the grand jury. The defendants' claims of unnecessary prejudice are groundless.

The Government's evidence established that on Sunday, August 10, 1975, two dead bodies were discovered in a U-Haul van parked on Claremont Avenue and West 122nd Street. The van was rented at the Gulf Station in the Bronx near Barnes' apartment at one o'clock, August 8, 1975, and it arrived at 122nd Street and Claremont Avenue where it was later discovered containing the bodies at approximately 3:30 P.M. that afternoon. Thus, it took only two and a half hours to travel the route from the Gulf Station in the Bronx, to put the bodies in the van, and to move the van to 122nd Street and Claremont Avenue. Moreover, the van travelled but fourteen miles from the time it left the gas statoin until it arrived at 122nd Street and Claremont Avenue. The distance from the gas station to 122nd Street and Claremont Avenue by the most direct route is 7.5 miles.

The Government's evidence that Barnes and Thomas gave perjurious testimony about their use of the van was

inextricably linked to the discovery of the bodies. Thus, the defendants each testified in the grand jury about the use of a U-Haul van on August 8, 1975 and their activities on that day. If evaluated in a vacuum, their account could be viewed, even after the proof of objective falsity, as inaccurate but not wilfully perjurious. Certainly, if the proof of the murders had been excluded, defense counsel would have been in a position to argue that the defendants could easily have been mistaken about their use of a van in the course of their prosaic daily activities. However, against the evidence that two days after their rental of the van, they learned that two dead bodies were found in it, it becomes almost impossible to believe that their recollection of the events could be innocently confused or mistaken. If deprived of this evidence, the jury could not have fairly assessed the defendants' intent and wilfulness when they testified about the van in the grand jury. The law is clear that the evidence of the object of the grand jury inquiry is relevant and admissible to establish the defendants' wilfulness and intent. *United States* v. *Demopoulos*, 506 F.2d 1171, 1177 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); *United States* v. *Enoch*, 360 F. Supp. 572 (D.Pa. 1973).

Similarly, the credibility of witnesses who gave vital testimony at trial was intimately connected with the discovery of the bodies. Glen Lehman testified that from the dormitory window where he was staying he saw the van parked on Claremont Avenue at about 3:30 or 4:00 p.m. on August 8, 1975, many hours before the defendants claimed they last used the van for moving their personal effects. (Tr. 324-26). Lehman's ability to recall such a seemingly trivial observation almost a year after the events in question can be explained only by the fact that two days later he saw the bodies being removed from the van, and at that time he recognized it as the same van he had previously observed. (Tr. 327-28). Without the

evidence relating to the dead bodies, Lehman's account could easily have been dismissed by the jury as incredible.

Likewise, Robert Walker testified that he observed the van on Friday night at 10:30 p.m. His ability to recall that event was only explicable in light of his later observation on Sunday of the removal of the bodies. (Tr. 291-96). Again, the witness' credibility could not have been fairly evaluated if he had been precluded from testifying about his observation of the removal of the bodies from the van. (Tr. 291).

Indeed, on cross-examination the Reverend Mr. Kight became confused about the date on which he was interviewed by the homicide detectives. Based on this confusion, defense counsel attempted, unsuccessfully, to shake Kight's recollection about the date he first saw the van. As Kight explained, "I knew of the homicides on the 10th, which would have cemented that date and that van. I could lose tract of when I talked to somebody a lot easier than I could lose track of something more closely connected." (Tr. 103-04).*

In addition to the importance of this evidence in establishing the wilfulness of the perjury and the credi-

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* It is hard to conceive how the evidence of the discovery of the bodies could have been omitted from the trial without making the case incomprehensible to the jury. The homicide detectives would have had to testify that they went to 122nd Street and Claremont Avenue on the morning of August 10, 1975, photographed the van, had the entire van dusted for fingerprints, examined the ignition of the van and examined the vehicle with extraordinary care. Absent the information that bodies were discovered in the van, such a course of conduct would have appeared to the jury to be irrational and if no explanation for this course of conduct had been provided, the jury would surely have provided a reason on the basis of speculation.

bility of crucial Government witnesses, the evidence established the defendants' motive to commit perjury. It is well established that proof of motive to commit a crime is admissible and that trial courts are given broad discretion to admit evidence of a fact tending to suggest a motive for the act charged. *Moore* v. *United States*, 150 U.S. 57, 61 (1893); *United States* v. *Sweig*, 441 F.2d 114, 117 (2d Cir. 1971); *United States* v. *Bronston*, 453 F.2d 555, 560 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 352 (1972); *United States* v. *Cifarelli*, 401 F.2d 512 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); *United States* v. *Rosenberg*, 195 F.2d 583, 595-96 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1953); 2 J. WIGMORE EVIDENCE §§ 385-406, pp. 327-83 (3d ed. 1940). Moreover, "[e]vidence of another crime has been admitted to show the likelihood of defendant having committed the charged crime because he needed . . . to conceal a previous crime. . . ." 2 WEINSTEIN'S EVIDENCE, ¶ 404 [09], pp. 404-53-54 (1975); *United States* v. *Jones*, 374 F.2d 414, 419 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967); *United States* v. *Marchisio*, 344 F.2d 653, 667 (2d Cir. 1965); *United States* v. *Cross*, 474 F.2d 1045 (5th Cir. 1973); *Dillon* v. *United States*, 391 F.2d 433, 435 (10th Cir.), *cert. denied*, 393 U.S. 825 (1968); *Metheaney* v. *United States*, 390 F.2d 559 (9th Cir.), *cert. denied*, 393 U.S. 824 (1968).

Here, the arrival of the van at the location where it was later found to contain two dead bodies only hours after the van had been rented by the defendants explained the reason for the defendants' false claim that the van had been stolen. It gave rise to a fair inference that the defendants had knowledge about the use of the van for the purpose of disposing of the bodies. If they possessed no such knowledge, they had no apparent reason to lie about their use of the van. If they had knowledge relating to the use of the van in the murders, they had a motive to protect themselves or others by lying about the

van's use between the time of its rental and the discovery of the bodies.

The defendants concede that proof of motive is relevant and admissible, but they argue that the evidence here lacked a proper "foundation" because the defendants were not directly linked with the murders. (Br. 8). Under the Federal Rules of Evidence, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." F.R.Evid. 401. Motive to lie was a fact of great consequence to the determination of the innocence or guilt of these defendants. The discovery of the bodies in the van was probative evidence of the defendants' motive to lie, even in the absence of evidence directly linking the defendants to the murders.

The evidence of the discovery of the bodies was also admissible to establish the existence of a larger plan, scheme or conspiracy which began prior to renting the van and of which their grand jury testimony was a part, namely, a scheme to conceal the true purpose of the rental and the true use of the van. Evidence is admissible "[t]o prove the existence of a larger continuing plan, scheme or conspiracy, of which the present crime on trial is a part." McCORMICK, EVIDENCE § 157 (1954); 2 J. WIGMORE EVIDENCE § 304, pp. 202-205 (3d ed. 1940); *United States* v. *Light*, 394 F.2d 908, 912-13 (2d Cir. 1968); *United States* v. *Bozza*, 365 F.2d 206, 212-14 (2d Cir. 1966); *United States* v. *Marquez*, 332 F.2d 162, 166 (2d Cir.), *cert. denied*, 379 U.S. 890 (1964); *See also*, *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir. 1974).

Barnes and Thomas also argue that the prejudicial effect of the evidence of the murders far outweigher the probative value, citing F.R.Evid. 403. An argument similar to that raised here was recently made and re-

jected by this Court in *United States* v. *Albergo*, 539 F.2d 860 (2d Cir. 1976). In *Albergo*, also a perjury case, the trial court admitted hearsay testimony from an FBI agent concerning his investigation of the theft of some 7,000 blank airline tickets, which theft provided the basis for the grand jury investigation. The Court rejected appellant's argument that this testimony was irrelevant and prejudicial:

> The balancing of relevance against prejudice is primarily for the trial judge; and, without a showing of abuse, his exercise of discretion will not be overturned. *United States* v. *Chapin*, 169 U.S. App. D.C. 303, 515 F.2d 1274, 1284 (1975), *cert. denied*, 423 U.S. 1015, 96 S.Ct. 449, 46 L.Ed. 2d 387 (1975). Agent Rigolizzo's testimony was not only material to an understanding of what took place before the grand jury; it was also relevant to an understanding of the taped conversations introduced during the trial. If, as appellant contends, the trial jury would have been fully aware of the scope of the grand jury investigation without this testimony, it could hardly be considered prejudicial. Indeed, there was virtually nothing in the testimony that was not easily inferred from the grand jury minutes. 539 F.2d at 863.

Certainly, in this case, the evidence of the two bodies found in the van was central to understanding what took place before the grand jury. Moreover, just as in *Albergo*, the death of the two men was clearly set forth and inferable from the grand jury minutes. (App. 14).*

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* Unlike *Albergo*, the evidence admitted here was not hearsay. For this reason and because the evidence was admissible on several additional grounds not present in *Albergo* (set forth above), the Government submits that the evidence was properly admitted under the standards set forth in both the opinion of the Court and the dissenting opinion of Judge Mansfield in *Albergo*.

Moreover, in this case the Government sought to limit any prejudicial impact of the evidence of the homicides, and it was the defendants who paraded the violence of the murders and their relationship to narcotics before the jury.** Thus, in cross-examining the homicide detective with respect to the death of Peterson and Wilson, defense counsel asked, "They weren't just shot, they were slaughtered, is that right?" (Tr. 160). He then elicited the number of bullet holes in each body and the location of each and inquired, "Would you say this was a gangland-type execution in your estimation of 19 years as a police officer?" (Tr. 160). He then elicited the manner in which the dead bodies were wrapped, (Tr. 161-63), and the fact that both of the victims were known to deal in heroin and cocaine in large quantities. (Tr. 170-71). Further, counsel asked whether or not the deceased Oscar Wilson was an informant and established that the deceased Oswald Peterson was under indictment at the time of his death. He then questioned the detective about where

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** The Government's direct examination elicited one inadvertent reference to the narcotics connections of the two decedents. In response to questions concerning the names of the deceased, one of the homicide detectives volunteered, "Both men known to this department as major narcotics violators." (Tr. 124). This response, unanticipated and subject to a motion to strike, was not objected to by the defense. Later, when the homicide dectective volunteered that, "There were numerous blotches that looked like blood on the front winshield due to the amount of flies that were in the vehicle," (Tr. 124), the prosecutor stated, "I have no objection to striking that out. I didn't intend to go into this area." The defense insisted. however, that the answer stand. (Tr. 124-25).

blood was located inside the van. (Tr. 172).* Thus, any unnecessary prejudice to the defense resulted not from anything the Government did, but rather from tactics employed by the defense.

It is for the trial judge to weigh the probative value of evidence, and such a ruling will rarely be disturbed on appeal.** *United States* v. *Gottlieb*, 493 F.2d 987, 992 (2d Cir. 1974); *United States* v. *Ravich*, 421 F.2d 1196, 1203-05 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). In this case trial court's ruling was supportable on several independent grounds and, most importantly, "the jury would have had only a truncated version of what was claimed to have occurred," *United States* v. *Bozza*, *supra*, 365 F.2d at 213, if the proof of the discovery of the bodies had been excluded.

POINT III

The Prosecutor's Summation Was Proper.

Barnes and Thomas complain of two brief comments in over fifty pages of prosecution summations. The first comments to which the defendants refer was contained in

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* As he later told the jury, defense counsel asked those questions to support his contention that because the defendants had no apparent links with the victims or with organized crime, they also had no reason to commit these murders and no motive to perjure themselves before the grand jury about their use of the van. (Tr. 42-21). Defense counsel thus chose to use the evidence of the dead bodies to his own advantage. Having chosen this strategy, he apparently also thought it in the defendant's interest not to seek a limiting instruction about this evidence. *Cf. United States* v. *Albergo*, *supra*. Had a limiting instruction been requested and given, the prejudice of which the defendant now complains might have been avoided.

** Judge Steward received legal memorandum and heard legal arguments both before trial and on the first morning of trial.

the Government's rebuttal summation. The argument was:

> You have heard the summations of both defendants and I suggest to you that what you have heard here is an attempt to divert your attention from the evidence in this case, from the only important issues in this case, from the sworn testimony that you have heard, to mere speculation, to divert your attention from the guilt or innocence of these defendants, to divert your attention to (sic) the lies that were told in the Grand Jury, and to raise all sorts of wholly unimportant and irrelevant issues in the hopes that they will sufficiently confuse you, that you will mistake——
>
> Mr. Goldberger [Counsel to Barnes]: I object. He is casting an ill motive on defense counsel in summation, that we would mislead the jury and try to confuse them.
>
> The Court: Overruled.
>
> Mr. Fortuin: In the hope that you will mistake confusion for reasonable doubt. (Tr. 487-88).

The bulk of these remarks quite properly urged the jury to decide the case on the evidence, not on speculation. To the extent that the argument suggested that the defense contentions were no more than a smoke-screen, the comment was a fair and appropriate response to the summations of defense counsel.

The defense argued that the prosecutor made certain documents disappear "like hocus pocus, a magic show" (Tr. 440); that the prosecutor "had" a witness testify to a version of events that the prosecutor deemed favorable (Tr. 441). They further argued that "you can do anything you want if you move [the evidence] around, and

that is what Mr. Fortuin [the prosecutor] has done in his summation. He's moved hings around any way he wants to." (Tr. 443). Moreover, the defense suggested that the homicide detective had, in essence, suborned perjury by arguing that witnesses could "remember certain things when it is put in their minds to remember certain things . . ." (Tr. 450). In view of these remarks, which attacked the integrity of the prosecution and the Government's investigators, the Assistant United States Attorney's remarks were entirely appropriate and restrained rebuttal. *United States* v. *Stassi*, Dkt. No. 113, slip op. 247, 255 (2d Cir., Oct. 26, 1976); *United States* v. *Tramunti*, 513 F.2d 1087, 1118-19, (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *DeAngelis*, 490 F.2d 1004, 1011-12 (2d Cir. 1974) (concurring opinion of Mansfield, *J.*); *United States* v. *Santana*, 485 F.2d 365, 370 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *La Sorsa*, 480 F.2d 522, 525-26 (2d Cir. 1973); *United States* v. *Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).

The second remark complained of related to a rental agreement which bore the U-Haul equipment identification number of the van in which the bodies had been found and bearing the name "Price". (GX 9). Martin Jaffe, one of the owners of the service station where the van had been rented, testified at the trial that, although the rental contract bore the number of the van, he could determine from examining the contract that the van in question had not gone out on the Price contract. (Tr. 215). The remarks in the Assistant United States Attorney's rebuttal summation, and the Court's admonition with respect thereto, are as follows:

> Then you have the other argument about the Price mileage, and once again the defendants could subpoena Mrs. Price if they thought that would be helpful to them——

MR. GOLDBERGER [Counsel to Barnes]: Objection. We agreed by stipulation that that would be the testimony.*

THE COURT: Overruled.

MR. FORTUIN: We did not bring her in here because Mr. Jaffe told us that she didn't rent that truck——

MR. FELDMAN [Counsel to Thomas]: Objection. Objection. Now he is testifying.

THE COURT: Overruled. When I overrule an objection, ladies and gentlemen, I do it only because I want to be sure you remember that Mr. Fortuin isn't telling you what the facts are; he is telling you what his view of the facts are. You are going to find out what the facts are from your own recollection of the testimony and the documents. (Tr. 449-500).

The defendants object to this remark on the mistaken assumption that when the Assistant United States Attorney said, "Mr. Jaffe told us she didn't rent that truck . . .," he was referring to statements by Jaffe to the Government outside the jury's presence. In fact the argument referred to Jaffe's testimony on the issue before the jury. (Tr. 215). The prosecutor's use of the word "us" clearly referred to the Court and jury. The comment was nothing more than an argument based on evidence before the jury and, therefore, was entirely proper.

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* There was no such stipulation.

POINT IV

The Trial Court's Finding on the Issue of Materiality Was Entirely Proper.

In the last point of their brief, the defendants ask this Court to "overrule" the Supreme Court's holding in *Sinclair* v. *United States*, 279 U.S. 263, 298-99 (1929), as well as a settled line of authority in this Circuit, *United States* v. *Doulin*, 538 F.2d 466, 470 (2d Cir. 1976); *United States* v. *Albergo*, 539 F.2d 860, 865 (2d Cir. 1976) (dissenting opinion of Mansfield, *J.*); *United States* v. *Mancuso*, 485 F.2d 275, 280 (2d Cir. 1973); *United States* v. *MacFarland*, 371 F.2d 701, 703 n.3 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967); *United States* v. *Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965), which establishes that the question of materiality of the testimony to the grand jury's inquiry is an issue to be decided to by the court. Even if this Court wanted to accept this invitation to depart from its own precedents, it could not very well ignore the authority of the Supreme Court's decision on this issue.

The defendants also claim that the district judge did not find that the testimony was material "beyond a reasonable doubt." While the judge did not use the words "beyond a reasnoable doubt" in making his ruling on materiality (Tr. 63-64), it is clear from his charge to the jury that he did so find. (Tr. 540-41, 543-44). Moreover, the perjurious testimony here was clearly material to the grand jury's inquiry. As Judge Mansfield has recently commented, *United States* v. *Albergo*, *supra*, 539 F.2d at 865 (dissenting opinion), 'the test of materiality . . . is fixed at such a low level that only a minimal amount of proof need be presented to the court to establish materiality; a showing from the grand jury minutes

or a statement from the prosecutor that the grand jury was investigating the matter under inquiry would suffice in most cases."

The claim with respect to materiality in this case is particularly disengenuous since prior to trial both of the defendants' attorneys agreed to stipulate that the defendants' testimony in the grand jury was material.* It was only when counsel sought to withdraw from their stipulation that a ruling from the court became necessary at all. (Tr. 43-46).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS M. FORTUIN,
AUDREY STRAUSS,
Assistant United States Attorneys,
Of Counsel.

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* See the transcript of the pre-trial conference held June 10, 1976 and defendants memorandum of law, filed in the District Court on June 15, 1976.

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THOMAS M. FORTUIN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of December, 1976 he served a copy of the within brief (final) by placing the same in a properly postpaid franked envelope addressed:

Goldberger, Feldman & Breitbart
401 Broadway
Suite 306
New York, New York 10013

An deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borought of Manhattan, City of New York.

Gladys D. D'Angelo

GLADYS D. D'ANGELO
NOTARY PUBLIC, State of New York
No. [illegible], Suffolk County
[illegible] Expires March 30, 1977

Thomas M. Fortuin

THOMAS M. FORTUIN
Assistant United States Attorney

Sworn to before me this

20th day of December, 1976.